

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :  
 :  
 v. : CRIMINAL NO. 98-178  
 :  
 ROBERT EARL MARTIN :

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

February 25, 2000

Defendant Robert Earl Martin ("Martin") was charged with armed bank robbery in violation of 18 U.S.C. § 2113(d) (Count I), and using and carrying a firearm during and in relation to a crime of violence (the bank robbery charged in Count I) in violation of 18 U.S.C. § 924(c)(1) (Count II). He was convicted on both counts. Martin filed a pro se post-trial motion for judgment of acquittal; the court subsequently appointed Jeffrey M. Lindy, Esq., to represent him, and Martin filed a supplemental motion for judgment of acquittal. For the reasons set forth below, this motion will be denied.

**BACKGROUND**

On March 6, 1998, a man with a double-barreled sawed-off shotgun robbed United Bank, 2820 West Girard Avenue, Philadelphia, Pennsylvania, and took \$6,694. On March 25, 1998, an informant told Philadelphia Police Detective Mary Seifert she believed the man in a surveillance photograph taken during the bank robbery was at a barber shop at 2125 Ridge Avenue, Philadelphia. Detective Seifert proceeded to the barber shop,

recognized Martin as the person in the surveillance photograph, and arrested him.

The main issue at trial was identification of defendant. The government called three eyewitnesses who identified Martin as the robber: Sandra Risco ("Risco"), the bank's head teller; Kimberly Smiley ("Smiley"), a security guard; and Margaret Green ("Green"), a customer service representative.

According to Ms. Risco's testimony, she was working at the second teller window in the bank when she heard sounds of a struggle. (6/30/98 Tr. at 37-38.) She then saw Martin, holding a gun beneath Smiley's neck; Martin was looking through her window, "right at [her] face." (6/30/98 Tr. at 38-39.) Martin then entered the teller area and removed money from one of the drawers. (6/30/98 Tr. at 48.) Following the robbery, Ms. Risco described the robber as a man "a little taller than [her]self<sup>1</sup>," between 130 and 140 pounds, wearing a baseball cap, a blue jacket, and with a "straggly looking face" in need of a shave. (6/30/98 Tr. at 50.) She also noticed that the robber moved with an unusual "side to side" walk. (6/30/98 Tr. at 50.) She estimated that it was five minutes between the time she saw Martin at the window until he ran out of the bank. (6/30/98 Tr. at 56.) On March 27, 1998, Ms. Risco spoke with an FBI agent and identified Martin as the robber from a photo spread of eight

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<sup>1</sup>Ms. Risco estimated her own height at five feet, six inches.

black males. (6/30/98 Tr. at 53; Gov't. Ex. 11.)

Ms. Smiley, an employee of Scotland Yard Security Company, was working as a security guard in United Bank the day of the robbery. She testified to seeing Martin enter the bank at around 12:30 p.m. that day; she spoke with him briefly, and he left. (6/30/98 Tr. at 77.) Approximately fifteen to twenty minutes later, Ms. Smiley saw Martin re-enter the bank carrying a sawed-off shotgun; he pointed the shotgun at her and, after she attempted to push it away, hit her on the head with it. (6/30/98 Tr. at 77-78.) Ms. Smiley testified that Martin pulled her through the bank lobby to the customer service area door, demanded to be buzzed into that area, and, after gaining entry, proceeded through to the teller area while Ms. Smiley remained in the customer service area. (6/30/98 Tr. at 79-81.)

Following the robbery, Ms. Smiley described the robber as five foot eight or five foot nine, "scruffy looking," wearing a light blue hooded jacket, dark jeans and a baseball hat. (6/30/98 Tr. at 76, 84.) On March 26, 1998, Ms. Smiley identified Martin in an eight person photo spread. (6/30/98 Tr. at 85.; Gov't. Ex. 10.) Ms. Smiley, in identifying Martin as the bank robber in court, (6/30/98 Tr. at 83), stated she had looked directly at Martin's face during the robbery (6/30/98 Tr. at 83-84).

Ms. Green, the third eyewitness, was working as a bank customer service representative the day of the robbery. She was

sitting at her desk in the customer service area when she saw the robber bring Ms. Smiley to the door and demand to be buzzed in. (6/30/98 Tr. at 138.) Ms. Green complied, watched the robber enter the teller area, and watched him again as he exited. (6/30/98 Tr. at 140-143.) After the robbery, Ms. Green described the robber as a black male, medium height, medium build, approximately 160 to 170 pounds, and wearing a jacket that zipped up the front. (6/30/98 Tr. at 145.) Ms. Green identified Martin as the robber at trial. (6/30/98 Tr. at 144.)

The government also called, among other witnesses, Federal Bureau of Investigation ("FBI") Special Agent Ronald Manning. Agent Manning testified he observed Martin walking with a "pigeon-toed" gait while in custody on March 25, 1998, (6/30/98 Tr. at 173), a significant observation because one of the eyewitnesses had described the robber as walking in a "struggling manner" when leaving the bank. (6/30/98 Tr. at 173.) According to Agent Manning, no fingerprints matching Martin's were recovered from the crime scene, and neither the money nor the shotgun was ever found. (6/30/98 Tr. at 178.)

The defendant called one witness, Richard Vorder Bruegge ("Vorder Bruegge"), an examiner of photographic evidence from the FBI Laboratory Division Special Photographic and an expert in photographic examination. Vorder Bruegge compared an arrest photograph of the defendant with a surveillance photograph from

the bank and concluded he could not tell whether the individuals were the same. (6/30/98 Tr. at 194-195.) He offered the opinion that there were many similarities between the two photographs, and testified that he came "very close to making a positive identification." (6/30/98 Tr. at 206-207.)

All of the photographic evidence was presented at trial. The jury viewed the bank video surveillance tape showing the robbery. Numerous surveillance photographs, several of which showed the robber, were also admitted in evidence, as were arrest photographs of Martin and the photo spread from which two of the eyewitnesses identified Martin as the robber. Among the facts the parties stipulated to are that Martin is five feet ten, 175 pounds, born on June 14, 1954, and the robber was in the bank for approximately one minute. (7/1/98 Tr. at 33-34.)

### **DISCUSSION**

Martin has moved for Judgment of Acquittal under Federal Rule of Criminal Procedure 29(c).<sup>2</sup> Martin argues: 1) the identification evidence presented by the government was insufficient to identify Martin as the robber beyond a reasonable

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<sup>2</sup>Rule 29(c) provides, in pertinent part: "[i]f the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal."

doubt; and 2) Martin was prejudiced by prosecutorial misconduct by the Assistant United States Attorney ("AUSA") during her closing argument.

### **I. Sufficiency of the Evidence**

A jury verdict must be upheld "if there is substantial evidence, taking the view most favorable to the Government, to support it." United States v. Schramm, 75 F.3d 156, 159 (3d Cir. 1996); Glasser v. United States, 315 U.S. 60, 80 (1942). A claim of insufficiency of the evidence places a heavy burden on the movant, since "[a] verdict will only be overturned 'if no reasonable juror could accept the conclusion of the defendant's guilt beyond a reasonable doubt.'" Id.; United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987).

Martin argues that the testimony of the three eyewitnesses was unreliable because they gave inconsistent physical descriptions and overestimated the length of the robbery. He also claims the testimony of Smiley and Risco about their ability to view the robber is contradicted by the surveillance pictures; he points to the absence of other physical evidence and the inability of Vorder Bruegge to conclude that the person on the bank surveillance photographs was Mr. Martin.

The Supreme Court outlined the factors a court should consider in determining the reliability of an eyewitness identification in Manson v. Brathwaite, 432 U.S. 98 (1977)

(affirming denial of habeas petition where identification procedure using only one photograph was suggestive, but there was no "substantial likelihood of irreparable misidentification" given other facts suggesting reliability).<sup>3</sup> The relevant factors include the opportunity of the witness to view the defendant during the crime, the degree of attention the witness paid to the defendant, the accuracy of the description given by the witness, the witness' level of certainty, and the time between the crime and the photographic identification. See id. at 114-116.

Here, each eyewitness had some opportunity for a close view of the defendant. There was a contradiction between Risco's testimony that she saw the robber while his hand was in the money drawer, and the surveillance photographs which show the robber with his back to Risco while he was looking in the drawer. But the photographs also show, consistent with her testimony, at least two other occasions when she had a clear view of the robber's face: when he looked through the window at Risco while pointing the gun at Smiley (Gov't Exs. 2-1 to 2-4), and when he first entered the teller area (Gov't. Ex. 2-34).

Smiley had similar opportunities to view the robber. Although she was standing behind the robber for much of the time,

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<sup>3</sup>Martin moved to suppress out-of-court and in-court identifications prior to trial; the court granted the motion to suppress only as to one witness. Defendant does not argue here (as he did in his pretrial motion) that the photo spread lineup was unreliable.

the photographs indicate at least one moment - right before the robber gained access to the customer service area - when Smiley had a full view of the robber's face (Gov't. Exs. 2-4 and 2-5). The surveillance photographs do not capture two other moments when Smiley claimed to have seen the robber's face: when he first entered the bank, and when he came back with the shotgun.

The descriptions the witnesses gave following the robbery of the robber's height, age, weight and clothing were not totally consistent, but the variations were minor. The reliability of the identifications is diminished by the brief time period of the robbery, but the photo spread identifications were made within a relatively short three week time period.

Reasonable jurors could have accepted that the identification evidence proved Martin was the robber beyond a reasonable doubt. The eyewitness testimony, the jurors' opportunity to compare the witness' descriptions of the robber with the surveillance photographs, and their opportunity to make their own comparison between the surveillance photographs and the defendant support their verdict. A more definitive conclusion by the expert witness that the defendant was the individual in the surveillance photographs would have helped the government's case, but given the other evidence, reasonable jurors need not necessarily have concluded its absence created reasonable doubt despite the recognized unreliability of eyewitness identification

in some circumstances. It is not the judge's role to substitute a personal opinion or doubt for the jury's verdict. The evidence was sufficient to sustain the guilty verdict.

## **II. Prosecutorial Misconduct during the Closing Argument**

Martin makes two claims of prosecutorial misconduct during the government's closing argument: improper vouching by the AUSA, and misrepresentation of the testimony of a witness.

Because no objections to the AUSA's closing argument were made during trial, this court only grants relief if the remarks constituted plain error. See Fed. R. Crim. P. Rule 52(b); United States v. Young; 470 U.S. 1, 15 (1985). The plain error doctrine should be applied to avoid a miscarriage of justice. See Young, 470 U.S. at 15. A guilty verdict should only be overturned based on plain error if the error was obvious and the outcome was affected. See United States v. Walker, 155 F.3d 180, 188 (3d Cir. 1998) ("I submit to you that," in context of other statements directing jury's attention to evidence, was not improper.)

### **A. Improper Vouching**

The problems with a prosecutor's vouching for a witness are that: "[S]uch comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence

presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." Young, 480 U.S. at 18-19.

Improper vouching consists of two elements: "(1) the prosecutor must assure the jury that the testimony of a Government witness is credible; and (2) this assurance is based on either the prosecutor's personal knowledge, or other information not contained in the record. Thus, it is not enough for a defendant on appeal to assert that the prosecutor assured the jury that a witness' testimony was credible. The defendant must be able to identify as the basis for that comment an explicit or implicit reference to either the personal knowledge of the prosecuting attorney or information not contained in the record." Walker, 155 F.3d at 187. Remarks referring to the evidence admitted at trial do not constitute improper vouching. See United States v. Dispoz-O-Plastics, Inc., 172 F.3d 275, 288 (3d Cir. 1999).

Martin argues that the AUSA improperly vouched for government witnesses in two separate statements during closing argument. The first referred to the validity of the eyewitness testimony:

I believe that given the lighting and the unobstructed views, the photo spread identifications . . . and the other various factors that you heard when these people testified, based on all of these things, you can find

that their identification of him is correct, that he did rob the bank.

(7/1/98 Tr. at 64.)

The second referred to the surveillance photographs:

Yes, they corroborate the government's view and corroborate the eye witnesses. They show you that the eye witnesses are not wrong when they come into court and identify Mr. Martin as the robber.

(7/1/98 Tr. at 64.)

The use of the phrase "I believe" alone is insufficient to constitute reversible error, and certainly not "plain error." The prosecutor's comments in both of these statements arguably satisfy the first criteria of improper vouching because they stated her opinion on the validity of the government witnesses' identifications, but neither statement contained either an implicit or explicit reference to personal knowledge of the prosecutor or information not in the record. Both statements clearly referred to evidence the jury might have properly considered.

B. Mischaracterization of the Evidence

Martin's claim of evidence mischaracterization is based on the AUSA's description of the testimony of Vorder Bruegge, the photographic evidence expert called by the defendant. Vorder Bruegge testified that, despite finding similarities between the two pictures, he could not make a positive identification. The AUSA made the following statements about his testimony:

And he told you that, to him, they certainly looked like the same person, but that there was no way, based on the exacting standards that he uses, that he could identify these as the same person.

(7/1/98 Tr. at 66.)

[R]emember what Mr. Vorter Brueggie (sic) was doing. He was not saying, can I recognize this man as this man?

I believe he did that when he said that it sure looked to him like the same person. What he was doing when he was conducting this expert examination was something very different. He was trying to make a determination that, in fact, from characteristics that, simply, would not occur in two people, that these are, from the photographs, the same person.

And that, clearly - the fact that he told you that he was as - he was sure that these were the same person, but he couldn't make the positive identification, we ask you to take that into account. It's not like he said, well, I was really down there by - remember, the third category he told you was rule out. This third category, he could have taken these photographs and ruled out Mr. Martin.

(7/1/98 Tr. at 98-99.)

Vorder Bruegge never stated he was "sure" the individuals in the two photographs were the same person, he did testify that he came "very close to making a positive identification," and that "there are a number of similarities" between the two pictures.

(6/30/98 Tr. at 206.) Some of the prosecutor's statements, taken in isolation, did mischaracterize the evidence because they suggested that Vorder Bruegge gave stronger testimony than he actually did about the similarities between the photographs. The main issue for the jury was identification of defendant as the bank robber, so the expert testimony was quite important. But

the prosecutor acknowledged that Vorder Bruegge never made a positive identification: her statement that Vorder Bruegge could not positively match the two individuals, but also could not conclude they were two different people was not inaccurate.

The court instructed the jury at the conclusion of the trial that their recollection of the evidence, rather than the lawyer's statements, should control. (7/1/98 Tr. at 110.) Such an instruction can neutralize misstatements made by attorneys during closing arguments. See, e.g., United States v. Perkins, 596 F. Supp. 528, 535 (E.D. Pa. 1984).

Viewing the record as a whole, the other statements in the government's closing argument that more accurately reflect the testimony of the photographic expert, and the court's curative instruction, the prosecutor's mischaracterizations in her closing argument do not constitute "plain error."

#### **CONCLUSION**

There was sufficient evidence from which a reasonable jury could find the defendant guilty of the crimes charged beyond a reasonable doubt. There was no improper vouching in the government's closing argument, and although there was some mischaracterization of the testimony of the defense witness, it was not significant enough to warrant reversal of the jury's verdict or a new trial for "plain error." The defendant's motion for acquittal will be denied.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. 98-178
	:	
ROBERT EARL MARTIN	:	

ORDER

AND NOW, this 25th day of February, 2000, upon consideration of defendant Robert Earl Martin's supplemental post-trial motion for judgment of acquittal, the government's response thereto, and in accordance with the attached Memorandum, it is **ORDERED** that;

1. Defendant Robert Earl Martin's supplemental post-trial motion for judgment of acquittal is **DENIED**.

2. Sentencing is scheduled for April 18, 2000 at 9:30 AM.

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S.J.